United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

74-2150

United States Court of Appeals
Second Circuit
No. 439 - September Term, 1974.

B
P/S

THOMAS W. SEELER, Regional Director of the Third Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board,

Petitioner-Appellant,

v.

Docket No. 74-2150

THE TRADING PORT, INC.,

Respondent-Appellee.

Petition For Rehearing
In Banc

To The Honorable Judges Of The United States Court Of Appeals For The Second Circuit:

The Trading Port, Inc., Respondent-Appellee, presents this petition for rehearing in the above-entitled case, suggests the appropriateness of rehearing in banc, and, in support thereof, respectfully shows:

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May 27, 1975, a panel of this Court, (Hays and Fienberg, Circuit Judges, and Holden, District Judge), reversed a decision of the United States District Court for the Northern District of New York, (Charles L. Brieant, Jr., Judge), insofar as it denied an application for a bargaining order under §10(j) of the Labor-Management Relations Act, 29 U.S.C. §160(j) (1970), and remanded the case to the district court to determine if the unfair labor practices, which it found reasonable cause to believe have been committed, were in fact so serious as to warrant the issuance of an interim bargaining order.

In reversing the court below, the panel ruled that where no previous bargaining relationship exists and the union has lost in an election of representatives, it is just and proper for a district court, upon an application for a temporary injunction under §10(j), to order an employer to bargain with that union based on a pre-election card majority if the court determines that the employer has engaged in such egregious and coercive unfair labor practices as to make a fair election virtually impossible.

This case is unprecedented. There is no other decision by a court of appeals concerning the issuance of a bargaining order under §10(j) where, as here, a union has lost an N. L. R. B. election. The only reported district court decision on such facts is Fuchs v. Steel-Fab, Inc., 356 F. Supp. 385, (D. Mass. 1973), where the court held it was not just and proper to issue a bargaining order.

In addition, the panel's decision appears to have overruled McLeod v. General Electric Co., 366 F.2d 847, (2d Cir. 1966), vacated on other grounds, 385 U.S. 533 (1967), sub silentio, insofar as the judicial standard for granting injunctive relief under Section 10(j) is concerned.

(1) Although §10(j) Empowers The Board To Petition A District Court For Appropriate Temporary Relief Or Restraining Order Upon Issuance Of An Unfair Labor Practice Complaint, The Decision In This Case Has The Effect Of Setting A Board Election Aside And Runs Counter To The Well Established Principle That Representation Proceedings Under Section 9 Of The Act Are Insulated From Judicial Intercession.

Section 9 of the Labor-Management Relations Act, 29 U.S.C. §159, concerns representatives and elections; Section 10 of the Act, 29 U.S.C. §160, concerns prevention of unfair labor practices; and these constitute separate areas under the statutory scheme.

An action to review a representation proceeding is ordinarily not cognizable by a district court. Review must normally await a final order in an unfair labor practice proceeding under Sections 10(e) and (f) of the Act, 29 U.S.C. §§160(e) and (f). Herald Company v. Vincent, 392 F.2d 354, 357 (2d Cir. 1968). District courts may review representation cases only in limited situations involving extraordinary circumstances. Leedom v. Kyne, 358 U.S. 184 (1958; McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963); Boire v. Greyhound Corp., 376 U.S. 473 (1964).

NLRB v. Falk Corp., 308 U.S. 453 (1940), was a proceeding for enforcement of a Board order in an unfair labor practice proceeding. It had been consolidated with a representation proceeding. In that representation proceeding, the Board directed that two affiliated unions, but not an independent union, be included on the ballot. Granting the Board's petition for enforcement, the court of appeals attached a condition which operated to modify the Board's direction of election so as to require that the independent union also be placed on the ballot. The Supreme Court held that the court below had committed error in modifying the Board's order, saying (id. at 310):

> "But Section 9 of the Act vests power in the Board, not in the court, to select the method of determining what union, if any, employees desire as a bargaining agent;"

The present case also involves a consolidated representation and unfair labor practice proceeding. The effect of granting a bargaining order is to nullify the election which was held in a representation proceeding that is still pending. The panel has, we respectfully submit, made a decision which is not for a court to make since Congress, in Section 9 of the Act, has entrusted representation matters exclusively to the Board in the first instance.

These jurisdictional impediments to relief - an election and still-pending representation proceeding - were not present in Smith v. Old Angus, Inc., 69 CCH Lab. Cas. ¶13,229 (D. Md. 1972), and Henderson v. Gibbons & Reed Co.,

53 CCH Lab. Cas. ¶11,081 (D. N.M. 1966), cited by the panel here (Sl. Sh. Op. pp. 3749, note 8, 3752). In those cases, there had been no election. There was no pending representation proceeding. They involve nothing more than unfair labor practice proceedings.

The significant difference is that, under the Board's practice, a bargaining order would not issue where an election had been conducted unless that election was first set aside on meritorious objections. In Irving Air Chute Co., Inc., 149 NLRB 627, enf'd, 350 F.2d 176 (2d Cir. 1965), the Board said:

> "We held in that case [Bernel Foam Products Co., Inc., 146 NLRB 1277, 56 LRRM 1039 (1964)] that a labor organization which loses an election may nevertheless seek bargaining relief under Section 8(a)(5) of the Act or Section 8(a)(1) in appropriate circumstances, where it appears that the employer has engaged in conduct requiring the election to be set aside. We will not grant such relief, however, unless the election be set aside upon meritorious objections filed in the representation case. Were the election not set aside on the basis of objections in the present representation case, we would not now direct a bargaining order even though the unfair labor practice phase of this proceeding itself established the employer's interference with the election." [Citation in brackets supplied.]

Moreover, the Board has devised its own rules concerning the handling of objections and standards for setting aside an election. Those objections may only be based upon post-petition events. Goodyear Tire & Rubber Co., 138 NLRB 453 (1962). See also Green Bay Aviation, Inc., 165 NLRB 1026 (1967). One of respondent-appellee's major arguments in this case was that its alleged misconduct during this critical period was insufficient

to warrant the Board's setting aside the election, a matter the panel did not mention, if indeed it even considered it.

An implicit consequence of the panel's decision is that a district court may examine a representation matter - which it has no right to do - and nullify the outcome of an election which, under Board law, is valid until set aside by the Board on meritorious objections in the representation case. We respectfully submit that such judicial intercession is counter to the statutory scheme established by Congress, and no legislative history supports the result reached in this case.

The panel wrote (Sl. Sh. Op. p. 3751):

> "As the Senate Report stated in regard to the need for 10(j):
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> '*Time is usually of the essence in these matters,* . . .' (emphasis added.) Senate Report No. 105, 80th Cong., 1st Sess., 8 (1947), cited in I Legislative History of the Labor-Management Relations Act, 1947. 414 (1948)"

However, the foregoing quotation appears in the cited Senate Report under the title, "Unfair Practices By Unions", and the paragraph preceding it demonstrates that the statement was in regard to the need for §10(k) and §10(l) - not §10(j). The Senate Report states;

> ". . . five specific practices by labor organizations and their agents, affecting commerce, should be defined as unfair labor practices. Because of the nature of certain of these practices, especially jurisdictional disputes, and secondary boycotts and strikes for specifically defined objectives, the committee is convinced that additional procedures must be made available under the National Labor Relations Act in order adequately to protect the public welfare which is inextricably involved in labor disputes.
>
> Time is usually of the essence in these matters, . . ." [Emphasis supplied.] Senate Report No. 105, 80th Cong., 1st Sess., 8 (1947), cited in I Legislative History of the Labor Management Relations Act, 1947, 414 (1948).

In other words, "these matters" refers to union unfair labor practices, especially jurisdictional disputes, secondary boycotts and prohibited strikes for which enactment of §10(k) and §10(l) was proposed.

The Legislative History of the Labor-Management Relations Act, 1947, has forty-seven page references to Section 10(j), and no reference remotely suggests that anyone ever envisioned that a district court was empowered to set aside an election and order bargaining on a Section 10(j) application with a representation proceeding still open and pending before the Board.

(2) The Panel's Decision Has The Potential For Involving The Courts In Making Initial Determinations In Representation Matters, Including Passing Upon The Validity Of Board Elections, Contrary To Repeated Pronouncements Of Judicial Deference To Board Determinations In Those Matters.

The panel may very well have overlooked that a consequence of its decision will be to involve the district courts in making initial determina-

tions in representation matters, resolving issues which call for application of the Board's expertise. District Judge Dooling was sensitive to this in Kaynard v. Lawrence Rigging, Inc., not officially reported, 80 LRRM 2600, 2604 (E. D. N.Y. 1972), noting that if the court was to undertake to decide such questions, it ". . . would invade an area exclusively preserved to the administrative-legislative adjudicatory powers of the Board." (id. at 2604)

In NLRB v. Olson Bodies, Inc., 420 F.2d 1187 (2d Cir. 1970), this Court said (id. at 1199):

> "The conduct of representation elections is the very archtype of a purely administrative function, with no *quasi* about it, concerning which courts should not interfere save for the most glaring discrimination or abuse."

In NLRB v. Mar Salle, Inc., 425 F.2d 566, (D.C. Cir. 1970), the Court said (id. at 570):

> ". . . the election machinery which Congress has entrusted to the Board must be left for the most part to that body's expertise and discretion. International Bhd. of Elec. Workers v. NLRB, No. 22,051, 71 LRRM 2402 (D.C. Cir. June 5, 1969), cert. denied sub nom. Presto Mfg. Co. v. NLRB, 73 LRRM 2120, 38 U.S.L.W. 3254 (Jan. 13, 1970). We recognized therein that the 'control of the election proceeding, and the determination of the steps necessary to conduct that election fairly [are] matters which Congress entrusted to the Board alone.' NLRB v. Waterman Steamship Co., 309 U.S. 206 (1940)."

In Pepsi-Cola Buffalo Bottling Co. v. NLRB, 409 F.2d 676 (2d Cir. 1969), cert. denied 396 U.S. 904 (1969), this Court said (id. at 681):

> "[I]t is in the cases which present difficult, factual and legal issues that the Board's superior knowledge and background is most desirable."

Congress entrusted the Board with a wide degree of discretion to fashion rules and standards governing the conduct of elections under Section 9 of the Act. NLRB v. Tower Co., 329 U.S. 324, 328 (1946). The Board is constantly re-examining and re-evaluating the standards under which its elections are to be conducted, a process illustrated by its decision in Modine Manufacturing Company, 203 NLRB No. 77 (1973).

District courts lack the exposure which the Board has to representation matters and do not possess the expertise which the Board brings to bear in determining the validity or invalidity of an election.

(3) This Proceeding Does Involve A Question Of Exceptional Importance.

The question whether a district court should issue a bargaining order under Section 10(j) when, as here, it has the effect of setting an election aside while the representation proceeding is still pending before the Board is, of itself, a question of exceptional importance. Beyond that, it is a question which will occur with some frequency. It will occur every time a Section 10(j) bargaining order is sought following an election where objections to the outcome of that election have been filed and an unfair labor practice complaint has been issued.

Conclusion

Upon the foregoing grounds, petitioner respectfully urges that a rehearing be granted in banc and that the order of the district court, upon further consideration, be affirmed.

Respectfully,

Edward L. Bookstein

Edward L. Bookstein for
Kohn, Bookstein & Karp
Attorneys for Respondent-
Appellee
100 State Street
Albany, New York 12207
518-449-8810

Dated: June 12, 1975

I hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for purpose of delay.

Edward L. Bookstein

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